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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5209

HARVIE MORROW,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT)

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS REQUESTED FOR REVIEW

1. Whether the petitioner's conviction in the state courts was so totally devoid of evidentiary support as to render that conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment.

2. Whether the trial court's admission into evidence of certain testimony given by two prosecution witnesses was violative of petitioner's constitutional right to a fair trial.

3. Whether the trial court's exclusion of vague testimony given by one of petitioner's alibi witnesses was such a gross abuse of the discretionary power of trial courts over evidentiary questions as to raise a due process issue.

4. Whether the petitioner's statement of claims regarding search and seizure and confrontation set forth the substance of his contentions with a degree of clarity adequate to comply with this Court's Rules of Practice.

STATEMENT OF THE CASE

Early in the morning of August 22, 1971, the deceased body of Joyce Eng, 17 years old, was found near the intersection of two Chicago streets. The lower part of the body was nude, the legs spread far apart. The subsequent police investigation showed a black and blue bruise on the inside of the left thigh of the decedent and also showed that her death had been the result of asphyxiation brought on by manual strangulation.

Rick Mackins and Harvie Morrow were later charged with and tried for murder and attempted rape in connection with the Joyce Eng case. After their case was heard by a jury, both Morrow and Mackins were found guilty. Consecutive prison sentences were imposed on Morrow of nine to 14 years for attempted rape and 50 to 150 years for murder; and upon Mackins of six to 12 years for the attempted rape and 30 to 75 years for murder. The defendants appealed their convictions and sentences to the Illinois Appellate Court, which, in a lengthy opinion reported at 17 Ill. App. 3d 24, 308 N.E. 2d 92 (1974), affirmed the convictions but granted a reduction in the rape sentences and ordered that each defendant's sentences run concurrently rather than consecutively. The defendants then sought relief in the Illinois Supreme Court; that Court denied leave to appeal.

Invoking 28 U.S.C. Sec. 1257(3), Morrow now petitions this Court for a writ of certiorari to the Illinois Appellate Court. He raises several claims that his right to a fair trial, guaranteed to him by the federal constitution, was violated by the proceedings in the Illinois courts.

The evidence adduced at the trial of Mackins and Morrow revealed the following:

Between 11:30 and 11:45 on the night of her death, Joyce Eng left the home of a friend, Juanita Villaneuva, where she had been visiting for several hours (Tr. 574).[1]

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1. "Tr." refers to the Transcript of Proceedings in *People* v. *Harvie Lamen Morrow and Rick T. Mackins*, Cook County, Illinois indictment number 71-2563.

The Villaneuva home is located about a block from the scene where Miss Eng's body was later found, Joyce Eng left her friend's house at this time in order to catch a bus at a nearby bus stop for the trip back to her own home (T. 584).

The Villaneuva home is on the south side of West 47th St., an east-west thoroughfare in the City of Chicago. Betty Bilben, Miss Villaneuva's next-door neighbor, happened to be looking out her window when Joyce Eng left the Villaneuva house and saw Joyce walk the short distance to the bus stop (Tr. 621 *et seq.*). The illumination provided by street lamps in this area was good (Tr. 619). At this time, Miss Bilben also saw a black Buick with a dent on the door of the driver's side and a patch of gray on the back side proceed first west and then east along the street adjacent to the sidewalk on which Joyce Eng walked to the bus stop. Miss Bilben noticed that there were two men in this car (Tr. 620).

About 12:45 a.m.—or about an hour after Miss Bilben saw these events—two Chicago police officers, riding in an automobile, came upon a car bearing two men and sitting with its lights off about half a mile from the scene where Joyce Eng's body was found (Tr. 739 *et seq.*). When the officers turned their headlights on this car, the auto sped away a short distance until it came to a red traffic signal, where it stopped. The officers pursued the car, stopped behind it at the traffic light, left their car and identified themselves to the occupants of the pursued vehicle. Those occupants were Morrow and Mackins. And the car in which the petitioner and his co-defendant were riding was later positively identified by Betty Bilben as the one that she had seen riding back

and forth while Joyce Eng was walking to the bus stop (Tr. 623-25).

After the officers had identified themselves, Morrow and Mackins again sped away. The officers chased them in their own auto, finally caught up with the defendants and placed them under arrest. At the time of the arrest, Morrow had fresh bruises, bleeding scratches and dirt on his face (Tr. 747).

Evidence introduced at the trial indicated that traces of blood found on the decedent's right hand were of blood type O (Tr. 955). Morrow's blood type was also O. It was also established, however, that type O is a very common blood type. Other evidence showed that adhering to the trousers that Morrow was wearing on the night of Miss Eng's death were eight clothing fibers that closely matched the composition of the cloth of which was made the sweater Joyce Eng was wearing when she was killed (Tr. 987-88). Also, it was established that the pants that Mackins was wearing on the night in question bore at least six fibers that similarly matched the fibers of the decedent's sweater (Tr. 962-63).

It was further shown that spectrographic analysis of paint chips found at the scene of the murder revealed that these chips bore, in terms of their chemical composition, a close and detailed correspondence with the paint on the left front fender of the car in which Mackins and Morrow were arrested (R. 1065 *et seq.*). The paint found in both places was a blend of three colors; samples of chips from both places were vaporized and found to be, and the colors were determined to be, of precisely the same character and layered in precisely the same order in both samples tested.

ARGUMENT

I.

PETITIONER'S CONVICTION FOR MURDER AND ATTEMPTED RAPE WAS SUPPORTED BY SUBSTANTIAL CIRCUMSTANTIAL EVIDENCE, AND THE STATE COURT PROCEEDINGS COMPORTED FULLY WITH THE REQUIREMENTS OF DUE PROCESS OF LAW.

In the first and central argument of his petition, Morrow asks this Court to reverse his conviction because the evidence adduced at his trial was insufficient to support the judgment of conviction. This Court has in several cases reversed convictions on the ground of insufficient evidence to establish the elements of the offenses with which the defendants had been charged. A notable reversal based on this ground came in *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960). Also see *Garner* v. *State of Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961), *Johnson* v. *Florida*, 391 U.S. 596, 88 S. Ct. 1713, 20 L. Ed. 2d 838 (1968), and, most recently, *Vachon* v *New Hampshire*, 94 S. Ct. 664 (1974). The rationale of *Thompson* and of these other cases was simply that the prosecution had failed to adduce at trial enough evidence that established that the defendant's conduct met the elements of the offense charged. This rationale is not available to petitioner because of the substantial amount of evidence—all of it circumstantial, to be sure— linking him to the murder and attempted rape of Joyce Eng.

No case has held that there is constitutional significance in the distinction between circumstantial and direct

evidence. Circumstantial evidence alone can be used to convict a defendant so long as that evidence is sufficient to establish that defendant's conduct met the elements of the offense charged. In this case there was surely enough evidence to convict petitioner of the crimes of murder and attempted rape. The petitioner was arrested half a mile from the scene of the crimes an hour after the offenses had been committed. The car in which he was riding at the time of the arrest matched the description of a car which a witness had seen being driven back and forth near the decedent shortly before her death. There were fresh and bleeding scratches on the face of the petitioner at the time of the arrest; the petitioner's blood type matched the type of blood found on the hand and under the fingernails of Joyce Eng.

There was further evidence that there was a close and detailed correspondence in physical composition between paint chips found under the fender of the car in which Morrow was arrested and chips found at the scene of the murder. Also, clothing fibers similar to those of which the decedent's blouse was made were found on the trousers that petitioner was wearing on the morning of his arrest.

There was evidence that Morrow, at the time of the arrest, had bleeding scratches on his face and abrasions on his elbows and on his right knee; there were stones at the murder site which undoubtedly caused those injuries. Both Mackins and Morrow testified on their own behalf at trial but offered no viable explanation for the existence of the abrasions on Morrow, nor for the scratches on his face.

Petitioner and his co-defendant twice attempted to flee the custody of the arresting officer—a fact circumstantially pointing to the defendant's consciousness of guilt and a fact from which reasonable jurors could conclude, in conjunction with all the other evidence, established guilt.

All of this evidence, plus other evidence cited by Illinois Appellate Court in its opinion, 308 N.E. 2d, at 93 *et seq.* surely provided a sufficient basis from which the jury could conclude beyond a reasonable doubt that petitioner was guilty of the offenses with which he had been charged. This case, then, does not come within the rule of *Thompson* and the related cases on which petitioner relies. Certiorari should, therefore, be denied.

II.

NO ERRORS OF CONSTITUTIONAL IMPORT WERE MADE IN THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF CERTAIN TESTIMONY, WHERE PETITIONER FAILED TO MAKE PROPER OBJECTION TO THE TESTIMONY AT TRIAL OR WHERE THE RECORD DOES NOT DISCLOSE THAT PREJUDICIAL INFERENCES COULD HAVE IN FACT BEEN DRAWN FROM THE SUSPECT TESTIMONY.

A.

Another contention raised by petitioner Morrow is that his 6th Amendment right to a fair trial was violated by the trial court's admission into evidence of certain testimony given by Chicago police officer Richard Bedram. The disputed testimony was to the effect that Officer Bedram had learned from a third party that a

suspect named Hickey had been given five polygraph tests in connection with the Eng homicide and that the results of the tests were "negative" (Tr. 710, 712-18). The petitioner urges that this testimony was unconstitutionally prejudicial for two reasons: First, it improperly demonstrated to the jury how thorough the police investigation was, thus implying that petitioner was guilty; second, it must have placed in the jury's mind the question, not properly there in the first place, why petitioner had not cleared himself by means of a polygraph test if in fact he was not guilty.

In its opinion in this case, the Illinois Appellate Court treated this argument in considerable detail and denied relief. *Mackins*, 308 N.E. 2d at 105-107. After a laborious examination of the record on the point, the Court, noting that the disputed testimony was elicited on cross-examination by Morrow's counsel rather than on direct examination, held that state procedural rules warranted denial of the claim that petitioner makes here. Finding that the petitioner had caused the disputed matter to be introduced at the trial, the Court held that "no party should be permitted to stand aloof or to 'sit by,' permit evidence to be received without objection and then to voice an attempted objection on appeal." 308 N.E. 2d, at 107.

It is well settled that this Court should not review contentions that have been disposed of by state courts on grounds that are both (1) adequate and (2) independent of rules of federal law, see *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965). This rule governs the Illinois Appellate Court's disposition of petitioner's argument as to the police officer's testimony. The Appellate Court's ruling is clearly independent of any consideration based on

federal law: that Court's opinion gives no hint of reliance on federal rules in its handling of the issue of Officer Bedram's testimony. And, as the Appellate Court's close analysis of the record suggests, 308 N.E. 2d, at 105-107, the record provides more than an adequate basis for the conclusion that Morrow waived the issue raised here by failing to make a proper and timely objection at trial, and by, in fact, raising the disputed testimony by his own cross-examination.

B.

The same reasoning applies to Morrow's claim that the admission into evidence of hearsay testimony concerning a pair of shoes that was found at the murder scene: Morrow was not wearing shoes when he was arrested. Petitioner claims that this testimony was so prejudicial as to amount to a deprivation of Sixth and Fourteenth Amendment rights, but this Court should deny certiorari because the Illinois Appellate Court, treating the matter at length, 308 N.E. 2d, at 107-108, concluded that relief should be denied because petitioner had not raised the point in his motion for a new trial nor in his brief on direct appeal. Here again, an adequate ground independent of federal law was used to dispose of the claim in the state courts, and the claim should not be reviewed by this Court, see *Jankovich, supra.*

C.

Morrow also argues that he was denied a fair trial because the trial court admitted into evidence testimony that, by implication, suggested to the jury that the police filed a murder charge against Mackins only after consulting with an assistant state's attorney.

Even assuming *arguendo* that the admission of the sort of testimony that petitioner describes would violate the 6th Amendment, it is abundantly clear that the issue raised in Morrow's petition is not really posed by the record. An examination of the record discloses that the 6th Amendment issue that Morrow seeks to extract from the trial testimony is not really raised by that testimony. This Court, therefore, should not improvidently grant certiorari to review the issue. The record shows that when a police officer began to testify to the effect that "the State's Attorney advised us . . .", defendant Morrow's counsel objected. The trial court sustained the objection, and the officer did not complete his statement (Tr. 850). The prosecutor then asked the officer what was done after the police had talked with the assistant state's attorney. The following colloquy ensued:

> A. We transported Harvie Morrow to the 9th District.
>
> Q. Why was he transported from the 3rd District to the 9th District?
>
> MR. SAMMONS [Counsel for Morrow]: Object.
>
> A. To charge him with murder.
>
> MR. SAMONS: Withdraw the objection.
>
> MR. FITZGERALD [Prosecutor]: Q. Why did you have to transport him to the 9th District to charge him with murder?
>
> A. There is no lockup at the 3rd District.
>
> Q. And where was that located?
>
> A. 3901 South Lowe.

It is on this meagre record that petitioner bases his extravagant assertion that the jury must have concluded that a murder charge was filed on the direct advice of a prosecutor and that the admission of the cited testi-

mony was tantamount to permitting a prosecutor to state at trial that, in his opinion, the defendant is guilty. A much less tortured reading of this record would yield the conclusion that, because the trial judge sustained the objection, the jurors did not know what the State's Attorney advised the police to do and that the jurors understood only that Morrow was transferred from one police station to another so that he could be placed in a lockup. Because the record does not generate the issue that petitioner would like this Court to decide, certiorari should be denied on the established principle that this Court does not decide constitutional questions in advance of the necessity of deciding them, *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Commissioners*, 113 U.S. 33, 39 (1885); *Wilshire Oil Co.* v. *United States*, 295 U.S. 100, 55 S. Ct. 673 (1935).

III.

THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF ONE OF THE PETITIONER'S ALIBI WITNESSES WAS WELL WITHIN THE TRADITIONAL DISCRETIONARY POWER OF TRIAL COURTS TO EXCLUDE IRRELEVANT TESTIMONY AND DOES NOT CONSTITUTE AN ISSUE OF CONSTITUTIONAL SIGNIFICANCE.

Morrow argues that it was constitutionally impermissible error for the trial court to exclude, on grounds of irrelevance, the testimony of Yolanda Garcia, who testified for petitioner as an alibi witness. The gist of Mrs. Garcia's testimony was that she had seen petitioner and his co-defendant outside her apartment building—that is, away from the scene of the murder—at the hour of the

night when Joyce Eng was killed but that she, Mrs. Garcia, could not remember in what month she had seen the defendants. The prosecutor moved to have this testimony excluded because of its extraordinary vagueness, and the trial court granted the motion (Tr. 1461).

The striking of this testimony was well within the traditional discretionary power of trial courts to exclude irrelevant testimony, see *People* v. *Handley*, 51 Ill. 2d 229, 237, 282 N.E. 2d 131 (1972). Mrs. Garcia's testimony was vague in the extreme. She failed to recall not only what Sunday she had seen the defendants in front of her building; she could not even remember in what month she had seen them (Tr. 1451).

This claim of petitioner was treated by the Illinois courts on an adequate basis arising from the law of that state on evidentiary relevance and should, therefore, not be reviewed by this Court.

IV.

PETITIONER'S SEARCH AND SEIZURE AND CONFRONTATION CLAIMS SHOULD NOT BE REVIEWED ON CERTIORARI BECAUSE HIS PETITION DOES NOT PRESENT THESE CLAIMS IN EVEN MINIMALLY CLEAR TERMS, AND THE FACE OF THE PETITION DOES NOT DISCLOSE THE FACTUAL OR LEGAL BASIS FOR THE CLAIMS.

Morrow's petition raises, in a crytic, obscure fashion, issues as to an illegal search and seizure (Morrow Petition, at 6) and as to what is called "restricted confrontation" (*Ibid.*, at 7). The sections of the petition covering these points refer the reader to the Transcript

of Proceedings of the Illinois trial and to other documents, such as Morrow's Motion for a new trial. The petition does not set forth with even minimal "accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration," Rule 23(j)(4), Rules of the Supreme Court of the United States.

Because of the sketchy, code-like way in which the search and seizure and confrontation issues are presented in the petition, the respondent is unable to address itself to them and requests that the Court deny certiorari as to these claims for failure to meet the minimal requirements of this Court's Rules of Practice. Rule 23(j)(3) mandates that "all contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition" so that reference to supporting documents is unnecessary for an evaluation of the facial validity of the claims made in the petition. This requirement the petitioner has clearly failed to meet, and the Court should treat this failure as "a sufficient reason for denying his petition," Rule 23(j)(4).

CONCLUSION

For the reasons expressed herein, the respondent respectfully requests that the petition for a writ of certiorari to the Illinois Appellate Court, First District, be denied.

Respectfully submitted,

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CERTIORARI DENIED